STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2013
v	No. 310134 Wayne Circuit Court
GEORGE TAYLOR III, Defendant-Appellant.	LC No. 11-009925-FC

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of third-degree criminal sexual conduct (CSC III), MCL 750.520d (force or coercion used to accomplish penetration), first-degree criminal sexual conduct (CSC I), MCL 750.520b (force or coercion used to accomplish penetration and personal injury caused or a weapon is used to accomplish penetration), assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to 9 to 15 years' imprisonment for CSC III; 12 to 30 years' imprisonment for CSC I; 4 to 10 years' imprisonment for AWIGBH;[1] and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences for CSC I, CSC III, and felony-firearm, but vacate the conviction and sentence for AWIGBH and remand for proper sentencing in accordance with the jury verdict.

Defendant first argues that he was deprived of his right to the effective assistance of counsel because defense counsel failed to file a pretrial notice to introduce evidence of his and the complainant's existing sexual relationship as required by the rape shield statute.[2] Because defendant did not raise this issue in a motion for a new trial or request an evidentiary hearing, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). An ineffective assistance of counsel claim "is a mixed question of fact

[1] The jury found defendant not guilty of AWIGBH, but guilty of the lesser offense of aggravated assault, MCL 750.81a(1), but defendant was sentenced for AWIGBH.

[2] MCL 750.520j.

and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review de novo questions of constitutional law. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced the defendant's case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To establish prejudice, defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different. *Id.* at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "'A substantial defense is one that might have made a difference in the outcome of the trial.'" *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526, 465 NW2d 569 (1990).

MCL 750.520j, which governs the admission of evidence concerning a victim's sexual conduct, provides, in relevant part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> * * *
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) . . ., the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. . . .

Regarding the notice requirement, "[t]his Court has held that failure to comply with the notice requirement of MCL § 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant." *Dixon*, 263 Mich App at 399. If a defendant fails to file a notice of intent, "the trial court must determine whether the evidence is admissible on a case-by-case basis considering whether the defendant's timing of the offer to produce such evidence suggests an improper tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect." *Id*. at 399-400.

During his opening statement, defense counsel indicated that defendant and the complainant had an existing sexual relationship. Defense counsel also stated that the

complainant consented to performing fellatio on defendant on the evening at issue. Further, defense counsel expected the complainant to deny performing fellatio on defendant on three occasions before the incident occurred. Before the beginning of proofs, the prosecution objected to defense counsel's opening statement on the ground that defense counsel had failed to file the required notice of intent required by the rape shield statute. Defense counsel countered that he was not required to file such notice in this instance. The trial court held that notice was required, but provided defense counsel an opportunity to provide legal authority to support his position. Evidently, such authority was not presented, and defense counsel did not cross-examine the complainant about her and defendant's alleged sexual relationship.

In addressing a similar matter, this Court concluded that "[d]efense counsel was constitutionally deficient for failing to file the required notice of intent to produce this evidence," especially where such evidence would be highly probative and it was "clear from the record . . . that the trial court determined to exclude this evidence based on defense counsel's failure to file a notice of intent." *Id*. at 400. As such, defense counsel's performance was, at the very least, constitutionally deficient for failing to file the required notice of intent where he intended to cross-examine the complainant about her alleged sexual relationship with defendant. But, although evidence of a consensual sexual relationship between defendant and the complainant could have been highly probative, *id.*, defendant has failed to establish the factual predicate for this claim and, further, that defense counsel's failure to file a notice to introduce such evidence in this instance deprived him of a substantial defense. *Carbin*, 463 Mich at 600; *Chapo*, 283 Mich App at 371. It is not apparent from the record, and defendant has not explained on appeal, how defense counsel sought to establish that he and the complainant had an existing consensual sexual relationship before the incident occurred and there is no direct evidence of such a relationship.[3] Nevertheless, the prosecution provided strong evidence that supported the complainant's allegations, including the complainant's blood located in the bathroom, a loaded shotgun in the basement, and testimony regarding the complainant's physical injuries. Therefore, defendant has failed to show that defense counsel's error was outcome determinative. *Carbin*, 463 Mich at 600.

Defendant next argues that there was insufficient evidence to sustain his CSC I, CSC III, and felony-firearm convictions.[4] We review de novo a sufficiency of the evidence challenge. *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290 (2012).

There is sufficient evidence to sustain a conviction if, after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a

[3] Defendant did present the testimony of Jowanna Mitchell, who implied the existence of a relationship between defendant and the complainant. There was also a brief reference, during defendant's interview, to a relationship between defendant and the complainant.

[4] Defendant does not challenge his aggravated assault conviction.

crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, "all conflicts with regard to the evidence must be resolved in favor of the prosecution." *Lee*, 243 Mich App at 167.

A defendant is guilty of CSC I if he engages in sexual penetration with another person through force or coercion and caused personal injury, or if the defendant was armed with a weapon, among other aggravating circumstances. *Brantley*, 296 Mich App at 551; *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010). A defendant is guilty of CSC III if he or she engages "in sexual penetration with another under certain aggravating circumstances, including sexual penetration accomplished by force or coercion." *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). "'Sexual penetration' means 'sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.'" *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009), quoting MCL 750.520a(r). In determining whether force or coercion was used, this Court has stated:

> MCL 750.520d(1)(b) provides that force or coercion includes but is not limited to any of the circumstances listed in MCL 750.520b(1)(f)(*i*) to (*v*). The existence of force or coercion is to be determined in light of all the circumstances. The prohibited force encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes. [*Phelps*, 288 Mich App at 132 (quotations, citations, and brackets omitted).]

Additionally, when prosecuting a CSC I or CSC III, the testimony of a complainant need not be corroborated. *Id*. Thus, "the complainant's testimony can, by itself, be sufficient to support a conviction of CSC." *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010). Finally, to establish that a defendant is guilty of felony-firearm, the prosecution must prove "that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant*, 235 Mich App at 505.

At trial, the complainant testified that she was forced to perform fellatio on defendant twice while at defendant's residence. The complainant testified that defendant physically assaulted her and then forced her into the hallway where she unwillingly performed fellatio on defendant for the first time. The complainant testified that she initially refused to perform fellatio on defendant but was then coerced do so after defendant retrieved a shotgun from another room and threatened her with the weapon. Shortly thereafter, the complainant ran to the bathroom to use her telephone to call for help. The complainant attempted to lock the bathroom door, but before she could, defendant forcibly opened the bathroom door. Once in the bathroom, defendant punched the complainant in the face, which caused the complainant to fall into the bathtub and knock her head on a ceramic soap dish that cracked as a result. The complainant testified that defendant then ordered her into his bedroom where he forced her to perform fellatio on him for the second time. While performing fellatio, the complainant recalled that she vomited

on her shoulder and possibly on defendant's pillow. Shortly thereafter, defendant allowed the complainant to leave his residence. The complainant reported the incident shortly after leaving defendant's residence. At this juncture, the complainant's testimony alone was sufficient to sustain defendant's convictions of CSC I and CSC III. *Szalma*, 487 Mich at 724.

Defendant's contention of insufficient evidence rests solely on issues of witness credibility. That is, he asserts that there was no credible or reliable evidence presented to support these convictions, particularly considering that the complainant provided differing details about the incident between the time she initially reported the incident and when she provided her statement to the police a few days after the incident. However, issues of credibility are left to the trier of fact to decide and, despite any perceived inconsistencies in the complainant's testimony, the trier of fact was nonetheless free to conclude that the complainant was credible. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Moreover, the prosecution presented strong physical evidence to support the complainant's allegations. Several witnesses observed the complainant with bruising and abrasions on her face and body after the incident occurred and photographs of her injuries were presented to the jury. At defendant's residence, Redford Police Department Detective William Hand observed that the frame of the bathroom door was damaged and he found a broken soap dish in the bathroom. Hand also located blood on the bathroom walls that matched the complainant's DNA sample reference and a loaded shotgun in the basement. Accordingly, when viewing this evidence in a light most favorable to the prosecution, there was more than sufficient evidence to establish that defendant was guilty of CSC I, CSC III, and felony-firearm.

Defendant argues in his Standard 4 Brief that he was deprived of his right to an impartial jury because of juror misconduct. Because defendant failed to preserve this issue, this Court's review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Jurors are presumed to be impartial and "[t]he burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). Further, juror misconduct does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103-04; 539 NW2d 739, 740 (1995). "Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury." *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

On appeal, defendant alleges that a juror conversed with a person familiar with the complainant during a recess, but has failed to provide any evidence or record cites to substantiate those allegations. Further, the record does not reveal any conduct that resembles juror misconduct, and defendant has also failed to establish that the alleged misconduct prejudiced his right to an impartial jury. Accordingly, there is no error requiring reversal.

Finally, although not raised in any of defendant's issues on appeal, defendant asserts that he is entitled to resentencing because he was erroneously sentenced for AWIGBH, but the jury convicted him of the lesser offense of aggravated assault. The prosecution concedes this error.

Therefore, we vacate the sentence for AWIGBH and remand for resentencing in accordance with the jury's verdict.

Affirmed in part, vacated in part, and remanded to the trial court for resentencing consistent with the jury verdict. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kurtis T. Wilder
/s/ Donald S. Owens